

SERVED : March 9, 1994

NTSB Order No. EA-4096

**UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of February, 1994

JOHN M. SMITH,

Applicant,

v.

Docket 70-EAJA-SE-9242

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Respondent .

OPINION AND ORDER

On May 11, 1993, the Eighth Circuit Court of Appeals reversed our order in this case, NTSB Order EA-3648 (September 1, 1992) , in which we disallowed respondent any EAJA¹ fee recovery in connection with his defense of an FAA order of suspension stemming from an incident in 1987. The court (Judge Arnold dissenting) reinstated the law judge's order awarding respondent \$20,562.02.

¹Equal Access to Justice Act, 5 U.S.C. 504.

On June 8, 1993, respondent filed a supplemental EAJA application, seeking recovery of attorney fees and expenses in addition to the \$20,562.02, in the amount of \$29,746.22, all stated to relate to the processing of the case before the Board (on the Administrator's appeal of the law judge's decision) and to the subsequent judicial review of the Board's order. The Administrator has not replied.

We grant the supplemental application as to the fees and expenses incurred as a result of the Administrator's appeal of the law judge's decision, and deny it as to the fees and expenses incurred as a result of the subsequent judicial review. We have no authority to award fees in connection with judicial review. Indeed, a separate statutory provision applies to proceedings before the courts and recovery of attorney fees and expenses in that forum. Compare 28 U.S.C. 2412(d) (1) (A) ("a court shall award . . . fees and other expenses . . . in any civil action . . . including proceedings for judicial review of agency action") and 5 U.S.C. 504(a) (1) ("An agency that conducts an adversary adjudication shall award . . . fees and other expenses . . . in connection with that proceeding") . See also 5 U.S.C. 504(c) (1) ("If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d) (3) of title 28, United States Code.") . Accordingly, those amounts incurred in

connection with judicial review of our decision are expressly excluded from any award here.²

The fees and expenses incurred as a result of the Administrator's appeal of the law judge's opinion are recoverable pursuant to 5 U.S.C. 504(a) (1). With the documents presented to us, however, we cannot confirm respondent's claim that the remaining \$14,321.67 was expended in connection with the appellate litigation before the Board and this petition. The billing summaries attached to respondent's supplemental filing appear to include fees relating to the original application heard by the law judge -- fees that should have been incorporated in the earlier \$20,562.02 award. See May 31, 1990 statement, pages 2-3. Further, respondent has failed to address whether the hourly rate charged, which is above \$75, falls within our recent increase to the fee ceiling. See 49 C.F.R. 821.26 (58 Federal Register 21543 (April 22, 1993)). A brief review of the billing entries suggests that considerably more fees apply to matters related to the judicial review proceedings than the appeal before the Board and preparation of the instant supplemental filing. Therefore, in the absence of a breakdown supporting the claimed amount, the \$14,321.67 figure necessitates greater scrutiny to ensure an accurate calculation that includes only those fees related to the Board appeal and the supplemental EAJA petition.

²These amounts are stated to be \$15,424.65, see Exhibit B page 1. But see discussion, infra.

Thus , although we find, in principle, that respondent is entitled to fees (subject to the applicable cap) and expenses in connection with the Board's appeal proceedings and preparation of the instant supplemental filing, respondent's filing is inadequate to justify an order in the amount he seeks. See 49 C.F.R. 826.6(c). We will direct, therefore, that respondent and the FAA review respondent's documentation and jointly determine: 1) the particular line items that relate to the processing of the case on appeal to the Board and preparation of the instant pleading; and 2) whether the actual fee may be recovered pursuant to 49 C.F.R. 821.26, as amended or, if not, the capped fee under that section.³ We direct this course, rather than referring this matter to a law judge for further record development, in view of the long delay since the costs were incurred. Nevertheless, if the parties cannot agree within a reasonable time, either may seek formal resolution of this matter from the Office of Administrative Law Judges.

³This direction does not now give the Administrator license to dispute the claim as excessive through a challenge to the total time expended or the time expended on particular days.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's supplemental EAJA petition is granted in part and denied in part, as set forth in this opinion; and
2. The Administrator is to pay the applicant an amount to be determined as set forth above.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.